

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

MOODY WOODROW TANKSLEY, ) No. CV 11-4871-PSG(CW)<sup>1</sup>  
 )  
 Plaintiff, )  
 ) MEMORANDUM AND ORDER  
 ) DISMISSING COMPLAINT  
 v. ) WITH LEAVE TO AMEND  
 )  
 ATASCADERO STATE HOSPITAL, et al., )  
 )  
 Defendants. )  
 )

The pro se plaintiff is a person in state custody, at Atascadero State Hospital, seeking to proceed in forma pauperis, on a civil rights complaint naming governmental defendants. His complaint was received on June 2, 2011, and was filed on July 20, 2011 (as docket no. 3), pursuant to the court's Order re Leave to File Action Without Prepayment of Filing Fee. [Docket no. 2.] For reasons stated below, the Complaint is dismissed with leave to amend.

## STANDARD OF REVIEW

Complaints such as Plaintiff's are subject to the court's sua

<sup>1</sup> Plaintiff has another pending civil rights action in this court, No. CV 11-6543. This Order concerns only No. CV 11-4871.

1 sponte review under provisions of the Prison Litigation Reform Act of  
2 1995 ("PLRA"), Pub. L. No. 104-134, 110 Stat. 1321 (1996). See 28  
3 U.S.C. § 1915A(a). The court shall dismiss such a complaint, at any  
4 time, if the court finds that it (1) is frivolous or malicious, (2)  
5 fails to state a claim on which relief may be granted, or (3) seeks  
6 monetary relief from a defendant immune from such relief. See 28  
7 U.S.C. § 1915(e)(2)(B)(in forma pauperis complaints); Lopez v. Smith,  
8 203 F.3d 1122, 1126-27 and n.7 (9th Cir. 2000)(en banc).

9 PLRA review for failure to state a claim applies the same  
10 standard applied in reviewing a motion to dismiss for failure to state  
11 a claim under Fed. R. Civ. P. 12(b)(6). See Barren v. Harrington, 152  
12 F.3d 1193, 1194 (9th Cir. 1998). A Rule 12(b)(6) motion to dismiss  
13 for failure to state a claim tests the legal sufficiency of a claim  
14 for relief. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). "In  
15 deciding such a motion, all material allegations of the complaint are  
16 accepted as true, as well as all reasonable inferences to be drawn  
17 from them." Id. "A Rule 12(b)(6) dismissal may be based on either a  
18 'lack of a cognizable legal theory' or 'the absence of sufficient  
19 facts alleged under a cognizable legal theory.'" Johnson v. Riverside  
20 Healthcare System, 534 F.3d 1116, 1121 (9th Cir. 2008)(quoting  
21 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
22 1990)). A complaint may also be dismissed for failure to state a  
23 claim if it discloses a fact or defense that necessarily defeats the  
24 claim. Franklin v. Murphy, 745 F.2d 1221, 1228-29 (9th Cir.  
25 1984)(citing 2A Moore's Federal Practice ¶ 12.08).

26 Possible failure to state a claim is reviewed in light of the  
27 pleading standard of Fed. R. Civ. P. 8(a)(2), which requires that a  
28 complaint must contain a "short and plain statement of the claim

1 showing that the pleader is entitled to relief." The Supreme Court  
2 has explained the pleading requirements of Rule 8(a)(2) and the  
3 requirements for surviving a Rule 12(b)(6) motion to dismiss in  
4 Ashcroft v. Iqbal, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937, 173 L. Ed. 2d 868  
5 (2009)("Iqbal"), Erickson v. Pardus, 551 U.S. 89, 127 S. Ct. 2197, 167  
6 L. Ed. 2d 1081 (2007)(per curiam), and Bell Atlantic Corp. v. Twombly,  
7 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); see also Moss  
8 v. U.S. Secret Service, 572 F.3d 962 (9th Cir. 2009).

9 The pleading standard of Rule 8 does not require "detailed  
10 factual allegations." Iqbal, 129 S. Ct. at 1949 (quoting Bell  
11 Atlantic, 550 U.S. at 555); see also Erickson, 551 U.S. at 93; Moss,,  
12 572 F.3d at 968. However, a complaint does not meet the pleading  
13 standard if it contains merely "labels and conclusions" or "a  
14 formulaic recitation of the elements of a cause of action." Iqbal,  
15 129 S. Ct. at 1949 (quoting Bell Atlantic, 550 U.S. at 555). Instead,  
16 to comply with the requirements of Rule 8(a)(2) and survive a motion  
17 to dismiss under Rule 12(b)(6), "a complaint must contain sufficient  
18 factual matter, accepted as true, to 'state a claim to relief that is  
19 plausible on its face.'" Iqbal, 129 S. Ct. at 1949 (quoting Bell  
20 Atlantic, 550 U.S. at 570). "A claim has facial plausibility when the  
21 plaintiff pleads factual content that allows the court to draw the The  
22 pleading standard of Rule 8 does not require "detailed factual  
23 allegations." Iqbal, 129 S. Ct. at 1949 (quoting Bell Atlantic, 550  
24 U.S. at 555); see also Erickson, 551 U.S. at 93; Moss,, 572 F.3d at  
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26 contains merely "labels and conclusions" or "a formulaic recitation of  
27 the elements of a cause of action." Iqbal, 129 S. Ct. at 1949  
28 (quoting Bell Atlantic, 550 U.S. at 555). Instead, to comply with the

1 requirements of Rule 8(a)(2) and survive a motion to dismiss under  
2 Rule 12(b)(6), "a complaint must contain sufficient factual matter,  
3 accepted as true, to 'state a claim to relief that is plausible on its  
4 face.'" Iqbal, 129 S. Ct. at 1949 (quoting Bell Atlantic, 550 U.S. at  
5 570). "A claim has facial plausibility when the plaintiff pleads  
6 factual content that allows the court to draw the the reasonable  
7 inference that the defendant is liable for the misconduct alleged."  
8 Iqbal, 129 S. Ct. at 1949 (citing Bell Atlantic, 550 U.S. at 556).  
9 This plausibility standard is not a probability requirement, but does  
10 ask for more than mere possibility; if a complaint pleads facts  
11 "merely consistent with" a theory of liability, it falls short of "the  
12 line between possibility and plausibility." Iqbal, 129 S. Ct. at 1949  
13 (quoting Bell Atlantic, 550 U.S. at 557).<sup>2</sup>

14 The Supreme Court has set out a two-pronged approach for  
15 reviewing possible failure to state a claim. Iqbal, 129 S. Ct. at  
16 1949-50; see also Moss, 572 F.3d at 969-70. First, the reviewing  
17 court may identify statements in a complaint that are actually  
18 conclusions, even if presented as factual allegations. Iqbal, 129 S.  
19 Ct. at 1949-50. Such conclusory statements (unlike factual  
20 allegations) are not entitled to a presumption of truth. Id. Here,

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22 <sup>2</sup> In Starr v. Baca, 633 F.3d 1191 (9th Cir. 2011), the Ninth  
23 Circuit discussed apparent differences in recent Supreme Court cases  
24 on the pleading standard under Rule 8(a), but concluded that,  
25 "whatever the difference between these cases, we can at least state  
26 the following two principles common to all of them. First,  
27 allegations in a complaint . . . must be sufficiently detailed to give  
28 fair notice to the opposing party of the claim so that the party may  
effectively defend against it. Second, the allegations must be  
sufficiently plausible that it is not unfair to require the opposing  
party to be subjected to the expense of discovery." Starr, 633 F.3d  
at 1204.

1 it is the conclusory nature of the statements (rather than any  
2 fanciful or nonsensical nature) "that disentitles them to the  
3 presumption of truth." Id. at 1951. Second, the court presumes the  
4 truth of any remaining "well-pleaded factual allegations," and  
5 determines whether these allegations and reasonable inferences from  
6 them plausibly support a claim for relief. Id. at 1950; see also  
7 Moss, 572 F.3d at 969-70.

8 If the court finds that a complaint should be dismissed for  
9 failure to state a claim, the court has discretion to dismiss with or  
10 without leave to amend. Lopez v. Smith, 203 F.3d 1122, 1126-30 (9th  
11 Cir. 2000)(en banc). Leave to amend should be granted if it appears  
12 possible that the defects in the complaint could be corrected,  
13 especially if the plaintiff is pro se. Id. at 1130-31; see also Cato  
14 v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995). If, however,  
15 after careful consideration, it is clear that a complaint cannot be  
16 cured by amendment, the court may dismiss without leave to amend.  
17 Cato, 70 F.3d at 1107-11; see also Moss, 572 F.3d at 972.

#### 18 PLAINTIFF'S ALLEGATIONS AND CLAIMS

19 Plaintiff is a patient at the Atascadero State Hospital.  
20 [Complaint ("Cpt.") at 2-3.] Plaintiff does not make clear whether he  
21 is also a prisoner, under a state court conviction, or is a non-  
22 prisoner detainee (either pre-trial or on a civil commitment), or is  
23 at Atascadero State Hospital on some other basis. In the caption of  
24 the Complaint Plaintiff names as defendants "Atascadero State Hospital  
25 Staff, et al." [Cpt. at 1.] In the body of the Complaint, Plaintiff  
26 names five individual defendants, in an individual capacity only, as:  
27 Joseph P., Kelly Barns, Bonnie Knoff, Mike Clement, and Neland D.  
28 [Cpt. at 3-4.]

1 Plaintiff alleges that, on May 23, 2011, he asked Mike Clement,  
2 Neland D., and other staff members for medication for his leg ulcers,  
3 and the staff members refused to provide medication. [Cpt. at 5.]  
4 Later, when Plaintiff was attempting to kill a fly on a window pane,  
5 staff members grabbed him by the hands, put him in restraints, and  
6 tied him to a chair. [Id.] This use of force made Plaintiff's leg  
7 ulcers open and start bleeding. [Id.] Kelly Barns and Joseph P. then  
8 kicked Plaintiff on the ulcers on his legs. [Id.]

9 Plaintiff claims that this was excessive force in violation of  
10 the Eighth Amendment, and seeks monetary damages under 42 U.S.C.  
11 § 1983. [Cpt. at 5-6.]

#### 12                     GROUNDS FOR DISMISSAL

13 To state a civil rights claim under 42 U.S.C. § 1983, a plaintiff  
14 must plead that a defendant, acting under color of state law, deprived  
15 the plaintiff of a right secured by the federal constitution or laws.  
16 See, e.g., Ortez v. Washington County, 88 F.3d 804, 810 (9th Cir.  
17 1996). The plaintiff must set forth factual allegations with  
18 sufficient particularity to give a defendant "fair notice of the type  
19 of claim being pursued." Id. Here, Plaintiff has asserted a claim  
20 that he was subjected to excessive force, in violation of his  
21 constitutional rights, by defendants acting under color of state law.

22 On the other hand, Plaintiff has not articulated any claim  
23 against Atascadero State Hospital as an entity, and he has not alleged  
24 any facts showing that Defendants Bonnie Knoff, Mike Clement, and  
25 Neland D. caused Plaintiff to be subjected to excessive force. See,  
26 e.g., Redman v. County of San Diego, 942 F.2d 1435, 1439-40 (9th Cir.  
27 1991)(en banc). Accordingly, Plaintiff's Complaint is subject to  
28 dismissal for failure to state a claim against those defendants.

1 On the other hand, Plaintiff may be able to amend to state a  
2 viable claim for excessive force against Defendants Joseph P., Kelly  
3 Barns. Therefore, Plaintiff will be given an opportunity to amend the  
4 Complaint to state a cognizable constitutional claim against a proper  
5 defendant or defendants. If he does so, he should make clear whether  
6 or not he is in custody as a convicted prisoner. This is significant  
7 because excessive force claims by prisoners fall under an Eighth  
8 Amendment standard, while excessive force claims by non-prisoner  
9 detainees fall under an Fourteenth Amendment, and the two standards  
10 are analyzed somewhat differently.

11 **ORDERS:**

12 It is therefore **ORDERED** as follows:

13 1. The Complaint is dismissed with leave to amend.

14 2. On or before November 17, 2011, Plaintiff may file a "First  
15 Amended Complaint" which corrects the defects discussed above and  
16 complies with the following requirements:

17 (a) The "First Amended Complaint" must bear the present case number  
18 "CV 11-4871-PSG(CW)."

19 (b) It must be complete in itself and may not incorporate by  
20 reference any part of the initial Complaint or any other  
21 complaint.

22 (c) Plaintiff may not use "et al." in the caption on p. 1, but must  
23 name in the caption each defendant against whom claims are stated  
24 in the First Amended Complaint. (The clerk uses the caption to  
25 make sure that defendants are correctly listed on the docket.)

26 (d) Plaintiff should attempt, if possible, to give the last names for  
27 any defendants now identified by initials (such as "Joseph P.").

28 (e) As noted above, it appears that Plaintiff can state an excessive

1 force claim against Joseph P. and Kelly Barns. If Plaintiff also  
2 names Bonnie Knoff, Mike Clement, or Neland D. as defendants,  
3 Plaintiff must allege facts showing how each such defendant used  
4 excessive force on him.

5 (f) Plaintiff may not add other new defendants without the court's  
6 permission.

7 3. If Plaintiff files a timely amended complaint, the court  
8 will issue further orders as appropriate; if not, the magistrate judge  
9 will recommend that this action be dismissed, without prejudice, for  
10 failure to prosecute and/or failure to comply with court orders, as  
11 well as for the reasons stated above.

12 4. The clerk shall serve this Memorandum and Order on  
13 Plaintiff.

14  
15 DATE: October 18, 2011

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18 CARLA M. WOHRLE  
19 United States Magistrate Judge  
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